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IN THE

Supreme Court of the United States

October Term, 1945

No. 593

BARNEY E. GASKILL, Et Al,
Petitioners,

vs.

CLAUDE A. ROTH, Trustee of the Property of the Chicago & North Western Railway Company, Et Al,
Respondents.

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF

S. L. Winters,
George O. Burgess,
Omaha, Nebraska,
Counsel for Petitioners.

Law Briefs—OMAHA LINO-SLUG PRINTING CO.—[illegible]

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In reply to respondents' brief in opposition to Petition for Writ of Certiorari, petitioners respectfully submit the following:

I.

The findings of fact of the District Court and the Circuit Court of Appeals, if to any extent concurrent, are *clearly erroneous.* This was manifestly demonstrated in the petition for the issuance of the writ. While it is true

that concurrent findings of two lower Courts are generally regarded as conclusive, this rule is not followed where, as in the case at bar, the findings are *clearly erroneous* (*United States v. Appalachian Electric Power Co.*, 311 U. S. 377). Nor is this rule strictly followed in cases taken to the Supreme Court because of conflict of decisions in different Circuit Courts of Appeal (*Sanitary Refrigerator Co. v. Winters*, 280 U. S. 445; *Thompson Spot Welder Co. v. Ford Motor Co.*, 265 U. S. 445). Petitioners pointed out such a conflict in the Petition for the Writ (page 28, printed Petition).

II.

Petitioners submit that this rule should not be invoked in opposition to issuance of the writ but if invoked at all should be presented and argued after the writ is issued and the matter is before the Supreme Court on the merits. For in the very case, *Anderson v. Abbott*, 321 U. S. 349, relied on by respondents, Order of Railway Conductors, Brotherhood of Railroad Trainmen and George Kimball, the Supreme Court, while accepting the findings of fact of two lower Courts, reversed the decisions below. In *Brewer-Elliott Oil Co. v. United States*, 260 U. S. 77 (80), cited in *Anderson v. Abbott*, supra, the Supreme Court stated: "Voluminous evidence of navigability was introduced and both the District Court and the Circuit Court of Appeals found the river at the place non-navigable. . . . Neither the argument nor the record discloses any ground which can overcome the weight which the findings of two courts must have with us." How could the Supreme Court fully and adequately determine the weight the decisions below are to be afforded unless the writ would issue and argument be had? Also cited in *Anderson v. Abbott*, supra, was *Alabama Power Co. v. Ickes*, 302 U. S. 464 (477), in which the Supreme Court reaffirmed the rule set out above. In

that case, however, both parties agreed to the evidence, but there were sharp differences as to the reliability. The disagreement was over the ultimate conclusions upon navigability drawn from the uncontradicted evidence. The Court said, in the *Alabama Power Co.* case, it would not accept as unassailable the findings below without substantial support in the evidence.

III.

The findings of fact of the two lower Courts certainly were not concurrent in their entirety. The District Court in its Findings of Fact (pages 197, 198, original record) made no separate finding concerning the 7.5 miles of trackage between Blair and California Junction. The Circuit Court of Appeals, faced with the fact that it had been stipulated that this trackage was part of the Nebraska Division, in order to decide against the petitioners found it necessary to go outside the issues of the case and claim that whatever damage was suffered was offset by work done by the petitioners over 5.9 miles of trackage between California Junction and Missouri Valley. This, in spite of the fact that the record shows this 5.9 miles was Nebraska Division (page 162, original record).

IV.

There *is* a question of local law. This is *not* an argument about the future and petitioners are *not* asking the Courts to make a bargain for them. Seniority rights are acquired on trackage, both leased and owned; not on "runs". The Nebraska Division men operated exclusively over the disputed trackage, both owned and leased for years by the North Western Railroad, prior to arbitrary action of the North Western Railroad giving rise to this controversy (page 141, original record), while the bargaining agreements (Exhibits A and B) were in full force

and effect. This fact alone conclusively shows petitioners had *existing* seniority rights—property rights—which they are attempting to enforce. *Rentschler v. Mo. Pac. R. R.*, 126 Neb. 493, 253 N. W. 693, and *Elgin-Joliet R. R. v. Burley*, 89 L. Ed. Adv. Opinon 17, page 1328, support them in their attempt. The so-called collective agreement of August 19, 1930 (pages 193-5, 198, original record), did not, and under the *Rentschler* and *Elgin* cases could not affect the *prior-existing* seniority rights of the petitioners.

V.

Petitioners sincerely, firmly and positively deny that their Petition for the Issuance of a Writ of Certiorari is in the least respect frivolous. Rather, petitioners, relying on the decision, *Rentschler v. Mo. Pac. R. R.*, supra, holding that seniority rights are property rights, request the Supreme Court to exercise a sound judicial discretion to hear and decide this case of great public importance and thereby protect the petitioners' right, guaranteed by the Fifth Amendment to the Constitution of the United States, which have been flagrantly violated by the arbitrary action of the North Western Railroad.

Respectfully submitted,

S. L. Winters,
George O. Burger,
Counsel for Petitioners.